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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ARCADIO KYLE GUAJARDO, Defendant and Appellant.	C068176 (Super. Ct. No. 10F04102)

A jury found defendant Arcadio Kyle Guajardo guilty of assault with a deadly weapon and found that he personally used a deadly and dangerous weapon in the commission of the offense. The trial court found that he had three prior serious felony convictions. Defendant was sentenced to state prison for 25 years to life and was awarded 317 days' custody credit and 158 days' conduct credit.[1]

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[1] The relevant 2010 amendment to Penal Code section 2933 does not entitle defendant to additional conduct credit because he was committed for a serious felony. (Former Pen. Code, § 2933,

On appeal, defendant contends certain self-defense instructions were improper: (1) CALCRIM No. 3471 did not apply to this case and its use undermined his defense, (2) CALCRIM No. 3472 lacked evidentiary support and its use was prejudicial, and (3) the cumulative effect of the two errors denied him a fair trial. We affirm.

FACTS

On June 17, 2010, close friends Levi Moses and Mario Arnold were waiting to board a Sacramento Regional Transit light rail train at a station in downtown Sacramento. Moses, age 23, was five feet nine inches tall and weighed 150 pounds. When the train arrived, Arnold attempted to board at the same time as defendant, who was carrying his bicycle. Defendant was angry, and the two exchanged words. After they boarded, defendant struck Arnold with the bicycle and more words were exchanged. Arnold asked defendant what his problem was, and defendant called Arnold some derogatory names. Arnold walked away from defendant, toward the back of the train car.

Moses boarded the train after defendant and walked past him. Defendant said some words to Moses and struck him with the bicycle. There had been no interaction between the three prior to boarding.

After defendant hit Moses with the bicycle, Moses turned around and they "got a little loud." Moses did not threaten

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subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

defendant, but he removed his backpack and threw it to the ground "just in case" there was an altercation. Moses raised his fists about waist level because defendant "was coming at" Moses "like he was getting ready to hit [Moses] or something."

Moses felt what he perceived to be a push, and he believed it was defendant who had pushed him. He had not seen anything in defendant's hand.

Moses backed up, and Arnold told him he had been stabbed. Moses was bleeding from the right side of his chest. Moses held his chest in disbelief and asked someone to retrieve his backpack. He and Arnold backed away from defendant without saying anything to him. Moses and Arnold left the train at the next stop. Defendant alighted at the same stop and rode away on the bicycle.

Moses was bleeding "pretty bad[ly]." Soon the police arrived and asked him what had happened. They called for an ambulance that arrived in 10 to 15 minutes. Moses had surgery for his wound, which took about three months to heal.

Moses explained the sequence of events depicted on a compact disc of video from the train car's security camera. Based on his memory and the video, Moses was sure that defendant was the person who had stabbed him.

Arnold, age 20, testified similarly to Moses. Arnold added that defendant had called him the "N-word" in their initial confrontation. Arnold did not threaten to beat up defendant. Arnold saw defendant hit Moses with his bicycle. Moses got mad and began arguing with defendant. Moses threw down his

backpack, and defendant threw down his bicycle. Defendant moved toward Moses, who got into a defensive stance. Arnold never saw a knife in defendant's hand. Nor did Arnold see Moses get stabbed; he merely assumed from Moses's condition that he had been stabbed. Arnold and Moses moved away from defendant and got off the train at the next stop.

Sacramento City Police Officer Christopher Lenert received a radio broadcast regarding the assault. He and another officer arrived one minute later and spoke with Moses. Moses lifted his shirt, which was covered in blood, and showed Lenert the wound. After telling Moses to keep pressure on the wound, Lenert called the fire department. Moses described his assailant as a male Hispanic adult, approximately 45 to 55 years old, medium build, salt and pepper hair and mustache, wearing a white T-shirt and light-colored pants, with a white bandage on his right arm. Lenert broadcast that description.

Sacramento City Police Officer Edwin Asahara was assigned to investigate this matter. After viewing the security video and reading the offense report, Asahara prepared an incident bulletin that was disseminated to law enforcement officers within Sacramento County.

Six days after the stabbing, officers who worked in an area north of downtown Sacramento advised Officer Asahara to contact defendant. Defendant's bandage and backpack drew Asahara's attention. There were no bruises or scratches on defendant's face. When showed a photograph of him, taken from the train video, defendant stated that the photograph slightly resembled

him but was not him. Defendant denied having been in a fight on the train.

A search of defendant's residence revealed a bicycle consistent with the one held by the assailant who had stabbed Moses. Officer Asahara created a photographic array that included defendant's photograph. Moses viewed the array and chose two of the six individuals as most resembling the assailant. Defendant was one of the two. Then, without further prompting, Moses said his "best guess" was that the person other than defendant was the assailant. Arnold was unable to select anyone from the array.

Sacramento County Sheriff's Officer Dustin Silva spoke with Arnold at the scene and gave Arnold a ride to the hospital. Arnold said a guy had gone out of his way to push his bicycle into Arnold as they were boarding the train. Arnold added that he had told the guy not to do it and had pushed the bicycle. Arnold said Moses also pushed defendant's bicycle and, suddenly, defendant had a knife in his hand. Defendant then stabbed Moses with the knife. Arnold did not claim defendant had used foul language or had thrown down his bicycle in an aggressive manner. Arnold said defendant had a folding knife with a blade about three inches long.

DISCUSSION

I

Self-Defense Instructions

Defendant contends CALCRIM No. 3471 did not apply to this case and its use undermined his defense. We disagree.

The trial court instructed the jury that the charge required the People to prove that defendant did not act in self-defense. Then the court gave three self-defense instructions. (CALCRIM Nos. 3470, 3471, 3472.)

CALCRIM No. 3470 told the jury: "Self-defense is a defense to Count One and the lesser crime of simple assault. The defendant is not guilty of that crime if he used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if: [¶] One, the defendant reasonably believed he was in imminent danger of suffering bodily injury; [¶] Two, the defendant reasonably believed that the immediate use of force was necessary to defend against the danger and; [¶] Three, the defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed that there was an imminent danger of violence to himself. The defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense. [¶] When deciding whether defendant's beliefs were reasonable, consider all the circumstances that were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's

beliefs were reasonable, the danger does not need to have actually existed. [¶] The defendant's belief that he was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably believe that the information was true. [¶] The defendant is not required to retreat. He is entitled to stand his ground and defend himself, and if reasonably necessary, to pursue an assailant until the danger of bodily injury has passed. This is so even if safety could have been achieved by retreating. [¶] The People have the burden of proving beyond a reasonable doubt the defendant did not act in lawful self-defense. If the People have not met this burden, you must find the defendant not guilty of Count One and the lesser crime of simple assault."

CALCRIM No. 3471 told the jury: "A person who engages in mutual combat or who is the initial aggressor has the right to self-defense only if: [¶] One, he actually and in good faith tries to stop fighting; [¶] Two, he indicates by words or conduct to his opponent in a way that a reasonable person would understand that he wants to stop fighting and that he has stopped fighting; [¶] And three, he gives his opponent a chance to stop fighting. [¶] If a person meets these requirements, then he has a right to self-defense if the opponent continues to fight. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or replied [*sic*] and it must occur before the claim to self-defense arose. [¶] If you

decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to stop fighting."

CALCRIM No. 3472 told the jury: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

The jury was also instructed that "[s]ome of these instructions may not apply depending on your findings about the facts of the case. After you've decided what the facts are, follow the instructions that do apply to the facts as you find them. (CALCRIM No. 200.)

Defendant did not object to CALCRIM No. 3470 as given or to CALCRIM No. 3472. However, he did object to CALCRIM No. 3471. He argued there was no evidence of mutual combat or that he was the initial aggressor. The court disagreed, stating its belief that the evidence supported the instruction.

After a full day of deliberation, the jurors sent the trial court a note indicating they were at an impasse. After reading some further instructions, the trial court sent the jurors back for further deliberations.

About 20 minutes later, the jurors sent the trial court a note requesting "more clarification on self defense 3470 & 3471." Without objection from counsel, the court sent the jurors a note asking what specifically they wanted clarified.

About an hour later, without responding to the court's inquiry, the jurors announced that they had reached a verdict.

Echoing his counsel's objection at trial, defendant argues there was no evidence to support *a mutual combat instruction* in this case. However, as he recognizes, CALCRIM No. 3471 applies, not only to a mutual combatant, but also to a "person who . . . is the initial aggressor."

Here, there was evidence that defendant was the initial aggressor, in that he struck both Arnold and then Moses with his bicycle before either of them engaged in physically aggressive conduct toward him. Thus, even if there was no evidence of mutual combat, the testimony of Arnold and Moses fully supports the trial court's ruling that "evidence in this case supports the giving of the instruction."

Because the jury was properly instructed pursuant to CALCRIM No. 200, there was little danger that the jury attempted to apply the "mutual combat" prong of CALCRIM No. 3471 even though it did not apply to the facts of the case. None of the factors defendant relies on for his claim of prejudice -- inconsistencies between Arnold's and Moses's trial testimony and their prior statements to police, the jury's inability to reach a verdict after a day of deliberations, and the jury's request for clarification of the self-defense instructions -- suggests that the jury struggled to apply the "mutual combat" language as opposed to the remainder of the instruction.

Defendant claims CALCRIM No. 3471's inclusion of the words "or who is the initial aggressor" is "puzzling" because the

words do not appear in the instruction's predecessor, CALJIC No. 5.55. However, defendant does not claim the self-defense right of an initial aggressor somehow is broader than the CALCRIM instruction suggests. Any such contention is forfeited. (E.g., *People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Wharton* (1991) 53 Cal.3d 522, 563.)

Defendant's reliance on the bench notes to CALCRIM No. 3471 is misplaced. The Bench Notes state that, when the court concludes *the defense of self-defense* is supported by substantial evidence and is inconsistent with the defendant's theory of the case, the court should ascertain whether the defendant wishes instruction on this alternate theory. (Judicial Council of California Criminal Jury Instructions, Bench Notes to CALCRIM No. 3471 (2011) pp. 1070-1071.) In other words, "when the trial court believes 'there is substantial evidence that would support *a defense* inconsistent with that advanced by a defendant, the court should ascertain from the defendant whether he wishes instructions on the alternative theory.' [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Defendant's reliance on this bench note is misplaced. Although the trial court evidently believed that CALJIC No. 3471 was warranted *because* there was evidence that *defendant had been the initial aggressor*, the court did not appear to believe there was substantial evidence that *would have supported a defense* that was inconsistent with the one advanced by defendant. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 157.) Thus, the

court had no duty to ascertain whether defendant wanted CALCRIM No. 3471. There was no error.

Defendant also contends the trial court erred prejudicially by instructing the jury with CALCRIM No. 3472 because there was no evidentiary support for the instruction. We disagree.

As noted, CALCRIM No. 3472 told the jury: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

Defendant acknowledges that he did not object to CALCRIM No. 3472 but claims the issue is reviewable because the instruction affected his substantial rights. (Pen. Code, § 1259.) The People respond that defense counsel's failure to object, plus his arguing of the instruction to the jury, estops him from complaining of the instruction on appeal. (Citing *People v. Franco* (1994) 24 Cal.App.4th 1528, 1537.) We find no estoppel.

Defendant's trial counsel acknowledged that, "if what [defendant] was doing was pushing people as he got onto the train and then pushing and yelling and trying to provoke some kind of fight so that he could use his three-inch knife, then he's not entitled to use self-defense. *But that's not what happened. What happened is the opposite of that*." (Italics added.) Thus, rather than attempt to use CALCRIM No. 3472 for his benefit, defense counsel simply argued that the instruction was factually inapposite. His comments do not estop him from renewing his argument in this court.

Echoing his summation at trial, defendant claims, "[i]t cannot be seriously argued that [he] picked a fight with a total stranger so that the stranger--Moses--would attack him and he could then stab Moses and claim self-defense."

The People counter that "the jury could have properly relied on CALCRIM No. 3472 had it found [defendant] provoked an assault by Moses in which he used his knife to 'defend' himself." Indeed, in his opening summation, the prosecutor had urged the jury to make this finding.

The prosecutor argued: "The final self-defense instruction is [CALCRIM No.] 3472. It essentially says a person does not have the right to self-defense if he provokes the quarrel simply so that he can use force. That's exactly what happened here. The Defendant felt disrespected. He felt angry. It was hot. These kids were pushing him out of the way to get on, and he was going to show them who's boss. [¶] He was going to show them, and that's reflected in his anger in pushing the bike at Mario Arnold. It's reflected in his anger at coming after Levi Moses when he had the temerity to turn around and say something to the Defendant. It's reflected on the video when he comes out from where he is and goes after Levi Moses. It's reflected in the fact that he had his knife ready to go. He was looking for an excuse to use force on somebody."

Thus, in his summation, the prosecutor inferred defendant's intent to provoke a fight or quarrel from the evidence presented at trial. Instead of acknowledging that the inference supports the jury instruction, defendant simply claims the inference

"cannot be seriously argued." We disagree. The jury was not compelled to draw the inference, but the prosecutor was entitled to argue it.

Defendant's reliance on *People v. Campanella* (1940) 39 Cal.App.2d 384 is misplaced. In that case, the killing was not preceded by any interaction comparable to defendant's interaction with Arnold and Moses during and after the boarding of the train, from which an intent to provoke a fight could be inferred. (*Id.* at pp. 385-388.)

Because defendant interacted with Arnold and Moses prior to the stabbing, this case is factually unlike *People v. Rogers* (1958) 164 Cal.App.2d 555, relied on by defendant, in which neither the decedent nor the defendant had been a part of the original argument. (*Id.* at pp. 556-558.) Here, nothing in CALCRIM No. 3472 "required the[jury] to reject all claim of self-defense." (*Rogers*, at p. 558.) Rather, the instruction simply highlighted a single scenario in which a claim of self-defense would not be available. There was no error or prejudice.

For these same reasons, we reject defendant's claim that CALCRIM No. 3472 violated his rights to due process and to present a defense.

II

Cumulative Effect

Defendant contends the cumulative effect of the foregoing two errors denied him a fair trial. Having rejected both claims

of error, we also reject the claim that the resulting trial had not been fair.

DISPOSITION

The judgment is affirmed.

ROBIE, Acting P. J.

We concur:

BUTZ, J.

MURRAY, J.